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February 9, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

Dear Ms. Salas:

Enclosed are the original and twelve copies of the comments of GVNW Inc./Management in response to the Commission's Public Notice in CC Docket No. 98-1.

Also enclosed is one copy of our comments to be stamped and returned in the enclosed self addressed stamped envelope.

Any questions regarding this filing may be directed to me at (503) 624-7075.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey H. Smith". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Jeffrey H. Smith

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
the Petition of the State of Minnesota)
Request for a Expedited Declaratory Ruling)
concerning access to Freeway Rights-of-Way)
under Section 253)
of the Telecommunications Act)

CC Docket No. 98-1

COMMENTS OF GVNW, INC./MANAGEMENT ON PETITION OF THE STATE OF
MINNESOTA CONCERNING ACCESS TO FREEWAY RIGHTS-OF-WAY UNDER SEC.
253 OF THE TELECOMMUNICATIONS ACT

Submitted by GVNW Inc./Management
PO Box 230399
Portland, Oregon 97281
February 9, 1998

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I. INTRODUCTION

The Commission has been faced with interpreting the issue of rights-of-way as set forth in Section 253 of the Telecommunications Act of 1996. The Commission has addressed these issues in several earlier matters, including CC Docket No. 96-98 and various petitions of interested parties (Classic Telephone, Chibardun Telephone Cooperative, Inc., etc.). The instant petition raises some new issues, and revisits several old ones. Our purpose in submitting comments in this proceeding is to place on the record our generic concerns related to rights-of-way issues and their impacts on our small, rural local exchange carrier clients that must utilize public rights-of-way to economically fulfill carrier of last resort obligations. We address first the issues surrounding section 253, and provide for the Commission's consideration several issues that should be included in any thorough review of the matter of management of public rights-of-way.

II. THE COMMISSION SHOULD NOT GRANT THE INSTANT PETITION UNDER SECTION 253 OR ANY OTHER PLEADING AS IT IS NOT IN THE PUBLIC INTEREST

GVNW agrees that the state has the authority to protect public safety by proper management of freeway rights-of-way. Similar to the differences found among and between LEC network facilities, rights-of-way differ across the country for reasons such as: the state and local regulatory climate, the differences in regional economic conditions, various aesthetic considerations involved, the network planning needs of the various utilities, and many other factors. Such diverse factors work against effective national standards. Nonetheless, the issue of exclusivity may be an area where Commission action is needed as GVNW strongly objects to the exclusive grant of rights-of-way to one party.

A. Restricting public utilities from using public rights-of-way is contrary to the tenets of the Communications Act

Within the Telecommunications Act, Section 253 sets forth the parameters by which the Commission is to determine if certain state and local regulations create a barrier to entry for competition. In accordance with Section 253(a), state and local governments are prohibited from imposing legal and regulatory requirements that impede the ability of any entity to provide interstate and intrastate telecommunications services. If states impose any legal and/or regulatory requirements that are not deemed to be barriers to entry, they must be applied to all entities on a competitively neutral basis in accordance with Section 253(b) in order *“to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”* Section 253(d) provides

that the Commission is required to preempt state and local laws and regulations that violate the provisions of Sections 253(a) and (b).

In a recent decision¹ the Commission addressed this issue of preemption in stating:

The exercise of our preemption authority ... is governed primarily by two distinct, but related standards. First, section 253 of the Act directs us to preempt any state or local requirement that "prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service", subject to the limited exceptions set forth in subsections 253(b), (c), and (f). Second, the Supreme Court has repeatedly affirmed federal preemption where there exists a conflict between federal and state law. Such a conflict may arise "where compliance with both federal and state law is in effect physically impossible" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Also germane to the issue of management of the public rights-of-way and concomitant compensation issues is the Commission's 1996 decision² in the Classic Telephone proceeding. In this Order, the Commission reviewed the extent to which Congress intended for the states and various localities to exercise their delegated authority to manage public rights-of-way in accordance with Section 253(c):

Section 253(c) preserves the authority of State and local governments to manage the public rights-of-way, but requires such regulations to be both competitively neutral and nondiscriminatory. In addition, section 253(c) permits State and local governments to impose compensation requirements for use of the public rights-of-way so long as such compensation is fair and reasonable, competitively neutral, nondiscriminatory, and is publicly disclosed. The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

¹ *In the Matter of the Public Utility Commission of Texas*, CCB Pol. 96-13, Memorandum Opinion and Order (released October 1, 1997).

² *Classic Telephone Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082 (1996).

B. Carrier of last resort obligations require multiple carriers to access the public rights-of-way on a non-discriminatory basis

The petition is unclear regarding the availability of other rights-of-way for facilities for other parties besides the state/developer **at a competitive price**. At Para. I C 2, the petitioner states that "alternative rights-of-way are available to new entrances to the fiber transport market." Nonetheless, it is because there is a clear competitive advantage to placing fiber in the freeway rights-of-way that the developer is providing capacity to the state at no charge in return for the exclusive use of the rights-of-way³. In the instant matter, the developer has entered into a contract with the State of Minnesota to provide up to 20% or more of its capacity, plus a significant number of dark fibers at no charge.

The alternatives offered by the petitioners, such as power lines, gas pipelines, and railroad rights-of-way, are not comparable alternatives. Each of these industries are considering or have already become competitive fiber transport or telecommunications providers. As such, they possess no incentive to provide access to their rights-of-way, and in fact have a disincentive to do so. Further, many power line and gas pipeline easements on private property do not allow for placement of telecommunications facilities as a permitted use. This results in the telecommunications provider having to negotiate individually with the property owner, with the end result being a substantial amount of monetary compensation flowing to the property owner.

³ Further evidence of the economic advantage of such an arrangement is found in the contract provision that allows ICN to terminate the agreement if this exclusive use is overturned by state or federal government decisions.

III. ANY FUNDS RECEIVED FROM CHARGING FOR PUBLIC RIGHTS-OF-WAY SHOULD BE EARMARKED FOR INTRASTATE UNIVERSAL SERVICE FUNDING

In managing the public rights-of-way, states may impose a fee pursuant to Section 253(c) for the use of public property if such fees are publicly disclosed, are deemed to be fair and reasonable, are applied on a competitively neutral basis, and if the access to public rights-of-way is made available on a nondiscriminatory basis. We recommend that the Commission and the states consider using such funds to assist in the funding of the intrastate universal service obligations as mandated in Section 254 of the Act.

IV. ANY RESTRICTIONS OF ACCESS TO PUBLIC RIGHTS-OF-WAY RAISES SERIOUS ISSUES THAT IMPACT THE PUBLIC INTEREST

We encourage the Commission to consider the following issues as it examines the issue of a state managing public rights-of-way. Section 251(b)(4) provides that all LECs must afford access to rights-of-way under rates, terms and conditions that are consistent with section 224. While this seems to indicate that Congress did not intend for exclusive granting of public rights-of-way, if circumstances dictate that an exclusive right-of-way is required, there must be strong, effective safeguards in place so that competitive neutrality is maintained.

A. Resale of excess capacity should be prohibited

The Commission should enact regulations that prohibit the reselling of any capacity, "lit" and/or dark fiber, that is part of an exclusive arrangement. This will preserve conditions of competitive neutrality. While we note that such a provision is stated in the contract with the developer, this language is missing in the petition. Such a prohibition should be considered a

prerequisite term of any grant of authority by the Commission to allow for exclusive rights-of-way.

B. Existing carriers in rights-of-way should be grandfathered

In its petition at page 19, Minnesota attempts to distinguish between granting a discriminatory advantage to use a new resource (freeway right of way) versus the imposition of additional restrictions on prior rights of way. While we do not believe such arguments have merit, they do create the need to discuss the treatment of existing rights of way. In this regard, there is a need to provide for the continuation of rights-of-way for incumbent providers, many of which use these rights-of-way to provide services as eligible telecommunications carriers to customers scattered across their service territory.

C. Special rules would be required for crossing issues

In this Minnesota application, we note as per Exhibit 7 that the exclusive grant of rights-of-way ties up a significant portion of the total freeway right-of-way in the Minneapolis-St. Paul area. Such a situation, providing a competitive advantage to one particular provider, should not be allowed to set a precedent that if applied in other locations would prevent certain eligible telecommunications carriers from providing service to all of their customers.

D. Adequate capacity must be provided for other carriers and this must be offered on a non-discriminatory basis at the same rate that the contract holder charges itself

The petition is unclear regarding the availability of a mechanism to ensure equitable pricing. There appears to be no provision in either the contract between the state and the developer or in the Petition for Declaratory Ruling for enforcement by the state or any other party

in the event of discriminatory pricing on the part of the developer. While the contract between the state and the developer states at 7.7 that the developer is required to price both collocated fiber and access to their network on a uniform and non-discriminatory basis, an enforcement mechanism is lacking.

Without an effective enforcement mechanism, it will not be possible to ensure that the rates are in fact fair, reasonable, and non-discriminatory, especially between urban and rural areas. A few of the more obvious issues to be resolved include:

- Who may file a complaint regarding discriminatory pricing?
- What are the procedures for filing a complaint?
- Which agency has the jurisdiction to hear the complaint and determine the validity of the complaint?
- What jurisdiction does the governing agency have over a developer?

Any state should be required to put forth a proactive program to assure that a developer or other entity's pricing is not discriminatory. This program should include a review of the pricing of similarly situated facilities of other competitive providers. A state should also be required to ensure that the corollary provisions of the Act are met in preventing price discrimination in rural areas.

In this Minnesota application, it appears that the Department of Transportation and the Department of Administration are involved, neither possessing expertise in telecommunications pricing issues. Without the involvement of the state Public Utility Commission, it appears that in this case the state has excluded its experts on the subjects of telecommunications pricing and

competition from a debate on this very topic. In general, we believe that a state public utility commission should be involved in pricing and non-discrimination disputes.

The state of Minnesota, in the instant application, appears to mask its desire for a competitive advantage by arguing that it is restricting "infrastructure", and not services (reference pages 13-17). This is clearly a case of form over substance. More importantly, the contract with the provider reserves the right to allow use by other utilities⁴, restricting ONLY additional fiber optic providers. Such utilities (e.g., pipelines), whose construction work would be more extensive than telecommunications fiber placement, would pose greater danger to the public.

E. Spare capacity must be determined subject to specific rules and forecasting techniques

As the Commission considers providing guidance to the states in this area, common sense may be applied to establish broad working guidelines. For example, there is insufficient capacity when the addition of more lines jeopardizes safety, reliability, or generally applicable engineering standards. The use of widely recognized engineering standards established by neutral third parties (e.g., IEEE) could provide guidance as to whether insufficient capacity exists.

V. CONCLUSION

GVNW supports efforts to ensure that state and local governments comply with the letter of , as well as the spirit and intent of, Section 253. It would appear that some of the requests in the state of Minnesota petition extend beyond the delegated management of public rights-of-way. As such, we believe that the examples detailed above are contrary to the intent of Congress and

⁴ This would seem to indicate that in the instant application, the state of Minnesota is inconsistent in its own arguments considering the public safety and welfare, and is concerned with its own pecuniary gain.

GVNW Inc./Mgmt. Comments in

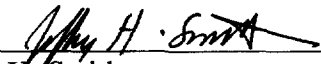
CC Docket No. 98-1

February 9, 1998

inconsistent with prior Commission decisions. A conclusion that granting such a petition is in the public interest cannot be reached.

Respectfully submitted,

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February 9, 1998